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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of	)	OFFICE OF SECRETARY DOCKETING & SERVICE BRANCH
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289 SP
(Three Mile Island Nuclear Station, Unit No. 1)	)	(Restart Remand on Management)

UNION OF CONCERNED SCIENTISTS OPPOSITION TO
MEMORANDUM AND ORDER DENYING MOTIONS TO DISQUALIFY

On February 20, 1985, Judge Ivan Smith denied motions made by the Commonwealth of Pennsylvania, TMIA and UCS that he disqualify himself from presiding in this proceeding. The NRC Staff has also called for Judge Smith's recusal. The Commission ordered the parties to respond directly to it, rather than to the Appeal Board, within five days.

UCS attaches and incorporates hereto "Union of Concerned Scientists' Motion to Disqualify Administrative Law Judge Ivan Smith and Answer to the Commonwealth's Motion to Disqualify," January 14, 1985. Rather than repeat the arguments contained therein, the instant pleading will supplement it by responding to the most important of Judge Smith's arguments.

1. It is inaccurate to suggest that the moving parties do not sufficiently understand the demands placed on the TMI operators.

Judge Smith begins the substance of his decision with a section labelled "Historical Perspective." Memorandum and Order Denying Motions to Disqualify," February 20, 1985, pp. 5-9 (hereinafter "Memorandum"). After describing the

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"compartmentalization" of issues which has characterized this case, Judge Smith expresses the concern "that none of the Counsel for movants fully appreciate how much is asked of the men and women who would operate TMI-1." (Id. at 8).

On the contrary, one of UCS's major concerns throughout this proceeding has been precisely this: that the design and procedures of TMI-1 place unwarranted and undue burdens on its operators, to the potential detriment of safety. See e.g. Union of Concerned Scientists Comments on Report of The Special Master May 18, 1982, particularly p. 18; Union of Concerned Scientists Comments Subsequent to Preliminary Hearing of March 18, 1982, Concerning the "Martin Report," March 26, 1982, particularly pp. 9-10; Union of Concerned Scientists' Brief on Exceptions, March 12, 1982, April 14, 1982, pp. 11-12, 19, 16, 45, 65-67, 71-75, 100-101. That is one reason why, in our view, operator training is such a crucial issue in this case. ALAB-772, 19 N.R.C. 1193, 1208, 1239, n. 61, 1279. Judge Smith is well aware of this. While UCS General Counsel was not present in Harrisburg during the remanded hearings, UCS was represented there by her law partner. All decisions regarding conduct of the case were made jointly, discovery was undertaken jointly and all written pleadings have likewise been collaborative efforts. UCS General Counsel has also been the author of the lengthy submissions to the Commission in July and October, 1984, detailing at length the state of the record and extra-record material in this

proceeding. There has been no discontinuity in UCS's case or in its representation. It is UCS's recognition of the demands placed on these operators -- which are, in our opinion, unjustifiably exacerbated by confusing procedures and poor design -- which underlies UCS' position.

2. The letter to Judge Rambo is extrajudicial

Judge Smith argues that the portions of the letter to Judge Rambo commenting on Mr. Floyd's conduct were "entirely derived from the official record." Memorandum, p. 21. While the bare facts concerning the events surrounding Mr. Floyd's cheating do stem from the record, the opinions put forward by Judge Smith regarding Mr. Floyd's motivations and character and the need for deterrence are speculations which do not stem from the record.[1] It is precisely these judgements which constitute the operative portions of the letter. Judge Rambo is fully aware of the bare facts of the case; Judge Smith's views are clearly offered in the context of indicating that extenuating circumstances exist militating against a strict sentence. In that context, Judge Smith offers two opinions: first, that Mr. Floyd acted impulsively and was not motivated by personal ambition, second, that there is no need for a strict sentence to deter similar conduct in future. These opinions are speculation that is not supported by the record.

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[1] As Judge Smith notes: "It is important to recall that Mr. Floyd's conduct, as such, was never an issue before the Licensing Board." Memorandum, p. 19.

On the contrary, with regard to Mr. Floyd's motivations and character, the record is clear that Mr. Floyd had months to do his last-chance take-home exam and never took it home to do it. Indeed, he had then been under an obligation for almost two years to demonstrate proficiency in several areas where his test scores were under 80%.[2] Because he did not attend clssses, he was given take-home exams. He never took them home despite being granted yet another grace period. 16 N.R.C. at 344. Instead, on the very day that he would have finally been suspended from licensed duties, with his vacation scheduled to start the next day, Mr. Floyd had a subordinate complete portions of his examination. Id. at 344-348.

Such conduct can not fairly be described as "impulsive." While the decision to cheat may have been made at the last minute, Mr. Floyd's cheating stems from a course of conduct of two years duration of disregarding his obligations, which he could have fulfilled at almost any time during that period. Moreover, the record does not contain support for Judge Smith's related opinion that Mr. Floyd "neglected his examination responsibilities out of a misguided but altruistic effort to attend to matters of perceived greater urgency." Mr. Floyd was

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[2] Mr. Floyd had demonstrated deficiencies in a total of four sections of the so-called "Fundamentals and System Review" on two separate examinations in 1977 and 1978. 16 N.R.C. at 344. This performance is at odds with Judge Smith's opinion as expressed to Judge Rambo that "he could have passed easily without deception."

excused from attending classes, which freed him to attend to matters of perceived greater urgency. He had only to take his exam home and complete it on his off-duty hours. While perhaps an annoying inconvenience, a take-home exam can not be seen as posing any conflict with Mr. Floyd's activities on-site, no matter how urgent. His failure to complete his exam in the months provided him was in no sense impulsive nor was his conduct altruistic. Indeed, it confirms the view of Mr. Arnold regarding Mr. Floyd's "poor judgment" in various areas. 16 N.R.C. at 346.

Nor does Judge Smith's opinion that a strict sentence is not needed for deterrence stem from the official record. There is no evidence on the record concerning the value of or need for a strict sentence in this case, with the possible exception of the evidence indicating that neither Mr. Floyd nor other TMI operators considered Mr. Floyd's reassignment after being caught cheating as disciplinary. 16 N.R.C. at 346-347 (¶ 2282). That evidence does not support Judge Smith's conclusion.

In sum, with regard to the two crucial opinions concerning Mr. Floyd's conduct offered by Judge Smith to Judge Rambo as relevant to sentencing, neither stems from the public record. They are therefore extrajudicial.

3. Judge Smith's actions have been inconsistent with the Code of Judicial Conduct.

Canon 2 B provides as follows:

> B . . . [A judge] should not lend the prestige of his office to advance the private interests of other; . . .He should not testify voluntarily as a character witness.

Judge Smith argues that his letter "was neither testimony nor did it relate to Mr. Floyd's character." Memorandum, p. 24. On the latter point, we do not see how it can be argued that the letter does not relate to Mr. Floyd's character. The purpose of the third paragraph is to relay Judge Smith's view that Mr. Floyd is hard-working, motivated in his bad moment by impulse rather than personal ambition, even "altruistic" and dedicated. In other words, that while he had a lapse, he is overall of good character and therefore, "leniency is appropriate."

Judge Smith argues that "the important test is whether I have employed the prestige of my office to advance Mr. Floyd's private interests." Memorandum, p. 24. His negative response to that question is based on two premises that cannot withstand scrutiny.

First, Judge Smith states that "no prestige of office was involved", Id. at 25. Common sense tells us, on the contrary, that Judge Smith's letter was solicited by Mr. Floyd's attorney in the hope that Judge Rambo would give it consideration precisely because of the "prestige" of Judge Smith's position. Second, Judge Smith argues that the letter was not sent to advance Mr. Floyd's private interest. While we understand that, as in any case, the ramifications of a sentence may extend beyond the individual directly affected (indeed, one of the purposes of any sentence is to deter others), the fact is that the person whose private interest will be directly affected by Judge Rambo's sentencing decision is Mr. Floyd. Thus, Judge Smith's letter presents a conflict with the Code of Judicial Ethics.

4. The Memorandum and Order confirms that Judge Smith has determined that he will not make any decisions, however justified by the facts, that might result directly or indirectly in what he believes to be unfair treatment of reactor operators.

UCS argues in its motion that Judge Smith has demonstrated an unshakeable unwillingness to take action which might, directly or indirectly, result in action adverse to individual operators although the evidence may require such a decision. UCS Motion to Disqualify. . . . pp. 7-12. The NRC Staff concurs generally that this is the appearance which has been created. The Memorandum and Order provides further confirmation.

Judge Smith states that "the movants do not seem to understand why the Board is concerned about the perception of unfairness by the licensed personnel" (Memorandum, p. 38) and goes on to discuss in particular Mr. Husted and H. A strong charge is then made:

> Messrs. Husted and H never had such a hearing [before removal of their licenses] nor an opportunity for one; they were bargained away. They have not been treated in accordance with the law." Id, emphasis added.

The charge is not supported in this record. For one thing, as Judge Smith recognizes, GPU is entitled under the law to withdraw its sponsorship of a license. Id. at 38, n. 24. Moreover, the most that either man was entitled to under the law was an opportunity to request a hearing. Considering that both the Special Master and the Licensing Board concluded that H had cheated extensively and that his continued denials, under oath in testimony to the Special Master, were not truthful (See 16

N.R.C. 303-309), H's failure to request a hearing was eminently rational and in his own self-interest. He was given another job within GPU and the two-weeks pay for his original suspension was returned. UCS Training Exhibits 17-20, Tr. 31936. Under the circumstances, it must be concluded that he knowingly and wisely waived any right to a hearing.

The same can be said for Mr. Husted, a licensed operator instructor during the time of the cheating. It should be recalled that Mr. Husted first refused to answer the questions of the N.R.C. investigators, later claimed to have remembered relevant information, but continued to withhold information within his knowledge. 16 N.R.C. at 318-319. Both the Special Master and the Licensing Board found his answers to the investigator "not believable" and his continued testimony in the hearings similarly "incredibly inconsistent." Id. at 318-319. Judge Smith himself found: "if Mr. Husted is representative of the TMI-1 training department, his attitude may be a partial explanation of why there was disrespect for the training department and the examinations." Id at 319. However the Licensing Board imposed no sanction on Mr. Husted. Id. at 320.

Subsequently, the Commonwealth entered into an agreement with GPU under which Mr. Husted was removed from licensed duties. ALAB-772, 19 N.R.C. 1193, 1222 (1984). GPU then assigned Mr. Husted as Supervisor of Non-licensed Operator Training. The Appeal Board found both the Licensing Board's nonaction and the agreement insufficient in view of the evidence on this record and barred Husted from supervisory responsibilities for

training. Id. at 1224. He has since been assigned to the Nuclear Safety Assessment Department, where GPU believes his knowledge can be used "very advantageously." Long and Coe, ff. Tr. 32,202 at 18. Under these circumstances, Husted's failure to request a hearing was also obviously rational, and in his own self-interest.

While Judge Smith recognizes that his repeated remarks in the reopened hearings concerning Mr. Husted "may seem to be inconsistent with the Appeal Board holdings" (Memorandum, p. 42), he believes they were for an "appropriate purpose." Id. at 43. We can find no such appropriate p rpose.[3] The fact that, even in this latest Memorandum, Judge Smith asserts without qualification the Mr. Husted and H were treated unlawfully is further evidence of his closed mind and his unwillingness to take action in this case, even if warranted, if the result might be directly or indirectly adverse to individual operators.

In this connection, Judge Smith raises a new issue: That something may have been lost by Mr. Husted's removal from licensed duties:

> What do we know about his replacement? What has been lost? What is the basis for assuming that safety has been improved by his dismissal from licensed duties? Memorandum, p. 39.

In fact, the qualifications and competence of GPU's corps of licensed operators and instructors is precisely the issue in the

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[3] Judge Smith states that the appropriate purpose relates to his responsibility to develop a complete and accurate record. Memorandum, p. 43. The issue is res judicata, as he acknowledges there is no responsibility to nor any purpose in developing a record on an issue that has been finally determined.

remanded training hearing and a great deal of evidence has been taken on the subject. The Licensing Board not only may but is obligated to resolve any doubts it may have about the competence of Mr. Husted's replacements as licensed operator instructors in that context. Any hearing requested by Mr. Husted would not have yielded information approaching the depth of that which is now before the ASLB on the subject of Judge Smith's safety concern; indeed it would not have dealt with the competence of his replacement at all.

Conclusion

As Judge Smith correctly notes, the current situation is uncomfortable for all of the parties involved. UCS does not question Judge Smith's assurance that he bears no personal animosity towards the parties. However, the Judge's actions and words, viewed in their totality, establish that he has reached prejudgment on issues central to this proceeding. He should therefore be disqualified.

Respectfully submitted,

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date: March 1, 1985

UCS - October 30, 1984

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